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Nonfeasance and the Duty to Assist: The American Seinfeld Syndrome

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Introduction

The Tragic Death of Sherrice Iverson

> Even in the middle of the night, the flashing lights of the Las Vegas casinos shine as brightly as ever. Inside, serious gamblers hardly notice the hour. The game is everything.
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> Leroy Iverson liked the slot machines. And though his daughter, Sherrice, was only 7, he would often bring her along. She would play while he gambled into the wee hours.
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> On Memorial Day weekend [1997], Iverson brought Sherrice to the Primadonna Casino, and once again, she was left on her own. Security cameras captured Sherrice playing what appeared to be a game of hide-and-seek with a stranger, a young man. No one knew it yet, but this was her last hour alive.
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> At 3:48 a.m., Sherrice is seen darting into the women's bathroom. Seconds later, the young man she'd been playing with follows. Just after 5:00 in the morning, Sherrice's body was discovered, half-naked, on a toilet seat. She had been sexually molested and strangled to death.[1]

Sherrice Iverson's death three years ago sparked a national debate, triggered partly because of the youth of her killer, eighteen-year-old high school senior Jeremy Strohmeyer.[2] Although Jeremy's acts were particularly abhorrent, he will receive a fitting

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* Readers may remember the final episode of the popular comedy, *Seinfeld*, wherein the lead characters were prosecuted for failing to assist a pedestrian who was being mugged. *Seinfeld* (NBC television broadcast, May 14, 1998). *Seinfeld's* swan song is a quintessential example of a failure to assist case. *See id.*

1. *20/20* (ABC television broadcast, Oct. 30, 1998).
2. *See id.*

punishment for his acts of violence—on October 14, 1998, he was sentenced to life imprisonment as part of a plea agreement.[3]

The outcry attracting more media attention, however, was not about the confessed teenage killer who strangled a seven-year-old in a casino bathroom. The newspaper columnists and the public at large instead preferred to vilify another teenager; one who stood on the toilet seat in the next stall, watched the brutality over a partition, and did nothing to stop it.[4] David Cash, an eighteen-year-old friend of Strohmeyer's, did exactly that; nevertheless he will escape any punishment for his actions that many call deplorable.[5] To add insult to injury, he also expected to profit from a movie deal and a lawsuit against former high school officials who barred him from graduation ceremonies following the murder.[6] "I'm no idiot. I'll (expletive) get my money out of this,"... "I figure I'll probably get a couple million off that," Cash said in an interview with the Long Beach, California Press-Telegram.[7]

Cash's actions in failing to assist the dying seven-year-old are arguably of the most reprehensible character.[8] Yet, Cash's irresponsible behavior was not confined to that casino bathroom, because he went on to denigrate the memory of little Sherrice in radio interviews.[9] "It's a very tragic event, OK, but the simple fact remains I do not know this little girl," Cash said on the air.[10] "I do not know starving children in Panama. I do not know people that die of disease in Egypt. The only person I knew in this event was Jeremy Strohmeyer, and I know as his best friend that he had potential."[11]

The only question that remains in this contemptible tale is whether Cash should now be held legally responsible for his "bastardly" actions.[12] Across the country, letters in opinion columns, editorials in newspapers, and magazine articles have

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3. *See id.*

4. *See, e.g.,* Martin Dyckman, *Standing By Can Be A Crime*, ST. PETERSBURG TIMES, Sept. 6, 1998, at 3D.

5. *See id.*

6. *See id.*

7. *See id.*

8. *See* Robert Selna, *Protesters Demand Berkeley Expulsion; UC Student Assailed For Alleged Role in Girl's Slaying, Special to the Examiner*, S.F. EXAMINER, Aug. 27, 1998, at A20 (demanding that Cash be expelled for "morally reprehensible behavior.")

9. *See* Dyckman, *supra* note 4.

10. Selna, *supra* note 8, at A20.

11. *Id.*

12. *See* Dyckman, *supra* note 4.

called for David Cash to be formally prosecuted for his behavior.[13] Because of the absence of a civil or criminal common law duty to assist, however, it is virtually impossible for Cash to be held liable for failing to help Sherrice Iverson.[14] His actions are not only ignored by the American justice system, but have been functionally condoned by courts under the common law system of liability.[15]

Even if the court system will allow such behavior to escape punishment, several state legislatures may soon independently decide the issue of duty to assist cases in the criminal context.[16] Several states, such as Massachusetts, Ohio, Rhode Island, and Vermont, already have criminal statutes that offer some such protection to victims like Sherrice Iverson and others.[17] In the wake of this little child's death, California, Nevada, New Jersey, and Michigan are attempting to follow suit as similar bills have been introduced in each of those states.[18]

Many European nations have had such legislation established for years, but lawmakers in the United States have not been as quick to enact laws imposing an affirmative duty to act upon witnesses of crimes or accidents.[19] But in response to Sherrice's death, not only are state legislators confronting the problem of how to punish people like David Cash, but the Federal government is as well.[20] In September 1997, Senator Barbara Boxer and Texas Representative Nick Lampson introduced the Sherrice Iverson Act, which would make states ineligible for federal child-abuse prevention funds under the Child Abuse Prevention and Treatment

13. *See* Associated Press, *Iverson Slaying Prompts "Good Samaritan" Bill*, LAS VEGAS REV. J., Sept. 30, 1998, at 3B; *see also* Tribune News Services, *"Good Samaritan" Law Sought*, CHI. TRIB., Sept. 16, 1998 at 3; Donrey Capital Bureau, *Bill Would Make Cash's Silence Illegal*, LAS VEGAS REV. J., Aug. 27, 1998, at 4A.

14. *See* John T. Pardun, Comment, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT'L. & COMP. L.J. 591 (1998), for a discussion of the general lack of a duty to assist in American jurisprudence.

15. *See id.*

16. *See* Associated Press, *"Good Samaritan" Bill Linked to Girl's Murder - Barbara Boxer and A Texas Congressman Introduce the Sherrice Iverson Act*, FRESNO BEE, Sept. 10, 1998, at B6; *see also supra* note 14 and accompanying text.

17. *See* MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1984); OHIO REV. CODE. ANN. § 2921.23 (Anderson 1984); R.I. GEN. LAWS § 11-56-1 (1956); VT. STAT. ANN. tit. 12 § 519 (1984).

18. *See Girl's Murder Prompts California to Consider 'Good Samaritan' Laws*, DESERET NEWS, Dec. 10, 1998 at A22; Stacy Finz, *Killing of Girl, 7, in Casino Spurs Good Samaritan Bills*, S.F. CHRONICLE, Dec. 9, 1998 at A21; Tribune News Service, *supra* note 13, at 3.

19. *See* Pardun, *supra* note 14, at 596-97.

20. *See* Associated Press, *supra* note 16, at B6.

Act if they failed to enact laws requiring third party witnesses to report sexual crimes against children.[21]

Bills such as these may represent a drastic change in American victims' rights jurisprudence. If passed, they could symbolize a step toward holding witnesses of such crimes responsible for failing to do something as simple as picking up a telephone and calling the police. This Comment will examine the traditional view of American courts and their reluctance to impose liability on bystanders who fail to assist at accident or crime scenes. Part I examines the current state of the law, including the general absence of a duty to assist and how that absence is interpreted in both civil and criminal law. Specifically, it discusses the reasoning in civil cases that withholding assistance is not actionable, either because no duty to assist exists, or because the defendant did not commit an "action." Part II analyzes the inherent inconsistencies in the current state of the law. It also compares the concept of disallowing recovery in duty to assist cases with the generally applied reasonably prudent person duty. Part III advocates a change in the existing law to provide for a reasonableness analysis in duty to assist cases. This Comment argues that allowing a jury to determine liability in cases of nonfeasance, based upon an objective reasonableness standard, provides a more consistent approach to the question of liability than does the current state of the law.

Part I

A. The General Rule of Nonfeasance

In both civil and criminal law, the failure of uninvolved bystanders to assist at accident or crime scenes is completely nonactionable, even if harm is forseeable.[22] The concept of "failing to act," often called nonfeasance, has been part of American law for hundreds of years, and the resulting nonliability remains virtually unchallenged even today.[23] However, although both civil

21. *See* S.2452, 105th Cong., § 2 (1997).

22. *See* Jackson v. Forest City Enter., Inc., 675 N.E.2d 1356, 1358 (Ohio 1996) ("Ordinarily, an individual possesses no duty to act affirmatively for the protection of others and the fact that harm to another is foreseeable as a result of a failure to act does not create a duty to prevent harm.").

23. *See* James Barr Ames, *Law and Morals,* 22 HARV. L. REV. 97 (1908) (discussing the common law position on the Good Samaritan rule). Although Black's Law Dictionary defines nonfeasance as "the failure to act when a duty to act existed," most modern courts equate the term with scenarios wherein recovery is denied. BLACK'S LAW DICTIONARY 440 (Pocket ed. 1996). *Cf.* Lewis v.

and criminal law are well settled on the lack of a duty to assist, different courts discuss the doctrine and deny liability using very different language.

Most victims, who would be plaintiffs in duty to assist cases if they were actionable, would characterize the defendants' negligent action as the "failure to do what ought to be done;"[24] this characterization allows ample room for courts to deny liability. In this realm, courts typically make decisions disallowing recovery upon one of two different bases; one, that the defendant's duty to assist the plaintiff was a moral duty, but not a legal one, and two, that any legal duty the defendant may have had did not encompass affirmative action.[25] In other words, courts usually analyze that the failure to assist did not constitute an affirmative act harming the plaintiff, or that the defendant was not legally bound to act.[26] More often than not, albeit, courts discuss the duty owed in the context of morality, in determining that even if a defendant "ought" to act, he is not legally required to do so.[27]

When American courts do hold persons liable for negligent or criminal acts, they most often explicitly determine that the defendant breached a specific duty that he owed to another person.[28] In imposing liability, the courts must determine that 1) the defendant had a duty, and 2) he breached that duty with an overt act.[29] This test is conjunctive; thus, if the court determines either that the defendant had no duty, or that he did not act, liability is not imposed.[30]

Razzberries, Inc., 584 N.E.2d 437,441 (Ill. App. 1 Dist. 1991) ("Liability arises from misfeasance, but not from nonfeasance."); *see also infra* note 27 and accompanying text.

24. Cameron v. Ohio Dep't of Transp. 669 N.E.2d 874, 877 (Ohio 1995).

25. *See Jackson*, 675 N.E.2d at 1358.

26. *See id.; see also* Melodee Lane Lingerie Co. v. American District Telegraph Co., 218 N.E.2d 661 (N.Y. 1966), for a discussion of the nonfeasance/misfeasance distinction and the importance of the distinction between action and inaction in determining liability. *See infra* Part I(A)(2), The "Action/Inaction" Analysis, for a discussion of the action/inaction distinction.

27. *See Jackson*, 675 N.E.2d at 1358.

28. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §§ 29-30 (5th ed. 1984 & Supp. 1988) for a discussion of the prima facie case of negligence. As the authors indicate, a plaintiff seeking to prove negligence must establish: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's negligence was an actual and proximate cause of the plaintiff's harm; and (4) the plaintiff suffered actual damages. *See id.* For the purposes of nonfeasance, only the first three prongs are of any significance. *See infra* Part I(A)(1) for a discussion of breach. *See infra* Parts I(C) and II(B)(2) for a discussion of causation.

29. *See* KEETON ET. AL., *supra* note 28, §§ 29-30.

30. *See id.*

1. The Duty Analysis—The American system of justice imposes various duties upon people—the duties to care for our children,[31] to maintain integrity in our professions,[32] and to be honest when testifying in court are but a few.[33] In addition to these specific duties, which are sometimes imposed by civil or criminal law, there is the time-honored "catch-all" of the duty to act as a "reasonably prudent person."[34] As the basis of tort law, the duty to act reasonably is nearly absolute; when that duty is neglected, a person can be held liable for any resulting harm.[35]

In both criminal and civil law, courts often determine that the duty owed to a crime or an accident victim by the public at large does not encompass affirmative acts.[36] For example, in *People v. Beardsley*, the defendant had been convicted of manslaughter in the death of his companion, Blanche Burns.[37] The two had been drinking together during the night, and Ms. Burns had also been taking morphine.[38] The combination of the substances led to Ms. Burns' death early the next morning.[39] The defendant, having been intoxicated, asked a friend to look after Ms. Burns but did nothing else to assist her once her physical condition began to decline.[40]

The trial court in *Beardsley* had originally determined that the defendant had a legal duty to assist Ms. Burns, the violation of

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31. *See* Florio v. Texas, 784 S.W.2d 415 (Tex. 1990). *Florio* discusses the general duty parents have to care for children in the context of a criminal prosecution of a live-in boyfriend who failed to assist a child. *See id.* Interestingly, the *Florio* court ruled that the boyfriend had no duty to the child, even though he was described as a "babysitter" and "caretaker." *See id.* at 417.

32. *See* State *ex rel.* Florida Bar v. Murrel, 74 So. 2d 221 (Fla. 1954) (discussing duties owed by attorneys to clients); Sugarman v. Bd. of Registration in Med., 662 N.E.2d 1020 (Mass. 1996) (discussing duties owed by psychiatrists to maintain integrity in the profession); Golde v. Fox, 159 Cal. Rptr. 864 (Cal. Dist. Ct. App. 1979) (discussing the duties real estate brokers have to maintain integrity in their profession).

33. *See* Dalbey Bros. Lumber Co. v. Crispin, 12 N.W.2d 277, 279 (Iowa 1943) (discussing the purpose of oaths to secure the truth in court).

34. *See* Drum v. Miller, 47 S.E. 421 (N.C. 1904). *Drum* recites the proposition that forseeable injury of any kind, and not the specific injury that was sustained, is sufficient for purposes of tort liability. *See id.* "[W]hen the act is lawful, the liability depends, not upon the particular consequence or result that may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act." *Id.* at 423.

35. *See id.*

36. *See infra* Part I(A)(1).

37. 113 N.W. 1128 (Mich. 1907).

38. *See id.* at 1129.

39. *See id.*

40. *See id.*

which was a crime.[41] On appeal, the appellate court also discussed the importance of a legal duty, but took great pains to distinguish Beardsley's legal duty from any moral obligation.[42] First, the appellate court emphasized the importance of moral duties, quoting *United States v. Knowles*:[43]

> [I]t is undoubtedly the moral duty of every person to extend to others assistance when in danger,. . .and if such efforts should be omitted by any one when they could be made without imperiling his own life, he would, by his conduct, draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society.[44]

Relying upon the difference between law and morality in its decision, the court noted, "we must eliminate from the case all consideration of mere moral obligation, and discover whether respondent was under a legal duty towards Blanche Burns at the time of her death. . . ."[45] The court ruled that Mr. Beardsley had not voluntarily undertaken any legal duty to Ms. Burns through his prior relationship to her, and thus could not be found guilty.[46]

In overturning Beardsley's conviction, the court specifically explained that "[t]he law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter."[47] "This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation."[48]

This discussion of duty in *Beardsley* mirrors the application of duty in civil law, and exemplifies the similarities between civil and criminal nonfeasance even as to the distinction between moral and legal liability. On the civil side, in *Yania v. Bigan*, the widow of a miner brought a suit arising out of a failure to assist scenario.[49] The decedent and the defendant had been business associates; during the course of a visit to the defendant's property, the defendant had asked the decedent to help him start a water pump in one of his

41. *See id.* at 1131.
42. *See Beardsley,* 113 N.W. at 1131.
43. *See* United States v. Knowles, 26 F. Cas. 800, 801 (D. Ct. N. Cal. 1864) (Nov. 15,540); *see also Beardsley*, 113 N.W. at 1131.
44. *See Beardsley,* 113 N.W. at 1131.
45. *See id.* at 1131.
46. *See id.*
47. *Id.* at 1129.
48. *Id.* at 1129.
49. 155 A.2d 343, 344 (Pa. 1959).

trenches.[50] The decedent jumped into the trench and was drowned.[51] His widow instituted a wrongful death suit, alleging that the defendant failed both to warn her husband about the danger of the trench, and that he failed to help him back out of the hole.[52]

The trial court sustained demurrers to the complaint, because of the failure to state a claim.[53] On appeal, the state's Supreme Court affirmed the decision, holding that the defendant had no duty to rescue the decedent, nor any duty to warn him of potential danger.[54] The court stated, "The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position."[55] The *Yania* court held that the complaint did not "aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water, and absent such legal responsibility, the law imposes upon Bigan no duty of rescue."[56]

2. *The Action-Inaction Analysis*—Contrarily, other courts deciding nonfeasance cases focus upon the defendant's conduct rather than upon any specific duty involved.[57] Typically, the failure to assist is labeled an "omission," and not as an "action."[58] In explaining the difference, the Supreme Court of Tennessee has stated in *Bradshaw v. Daniel*:

> In determining the existence of a duty, courts have distinguished between action and inaction. Professor Prosser has commented that "the reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs."[59]

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50. *See id.*
51. *See id.*
52. *See id.*
53. *See id.*
54. *See Yania,* 155 A.2d at 345-46.
55. *Id.* at 346.
56. *Id.*
57. See *supra* Part I(A); *see also supra* note 23 and accompanying text. For the purposes of this comment, discussion will be limited to an examination of action and duty. *See id.*
58. *See generally* Melodee Lane Lingerie Co. v. American District Telegraph Co., 218 N.E.2d 661 (N.Y. 1966).
59. *See* Bradshaw v. Daniel, 854 S.W.2d 865, 870 (Tenn. 1983) (quoting KEETON ET AL., *supra* note 28, at § 56).

Crime and accident bystanders are not legally bound to act affirmatively; therefore, a jury does not determine the issue of reasonableness in cases of omission since someone cannot 'inact unreasonably.'[60] Through this reasoning, a person can fail to assist an assault victim without incurring liability even if a jury could find his conduct unreasonable.[61] Courts often draw this distinction again presupposing that the obligation to assist is a moral one; yet, they decline to require assistance legally.[62]

For the purposes of duty to assist cases, there is sometimes no clear line between an "action" and an "omission."[63] In criminal law, the "*actus reus*," or the external part of the crime, provides a definition of "action."[64] Contrary to caselaw definitions of nonfeasance, however, many criminal codes define the *actus reus* as conduct which "includes a voluntary act *or the omission* to perform an act of which he is physically capable."[65] This is different from *Beardsley* and other cases which distinguish acts from omissions and thus perpetuates the difficulty in defining the "action" for the purpose of nonfeasance.[66]

References to omissions in the criminal context, however, are frequently interpreted as requiring punishment for behavior under

60. *See id.* The logical argument in this context is that reasonableness can only be confined to action, and that inaction cannot be viewed as unreasonable because it is a nullity; effectually, inaction does not exist and therefore cannot be unreasonable.

61. *See id.; see also* Hughes v. State, 719 S.W.2d 560, 565 (Tex. Crim. App. 1986) (Teague, J., concurring). In Justice Teague's concurring opinion, subtitled "A Requiem Dedicated to the Kitty Genoveses of this Country," he discussed the famous saga of Ms. Genovese, who was murdered outside her apartment in Queens, New York, in 1964. *Id.* Thirty-eight people in her apartment building heard her screams, but did nothing to assist her. *See id.* Teague asks the question, "Why did those good persons not come forth to aid Kitty, a fellow human being, who was then being mauled by nothing less than a rabies-infected animal, who was then disguised as a human being? . . .[I]t was their fear of legal consequences, and not necessarily their timidity or lack of bravery, that chilled their better instincts to intervene on behalf of Kitty!!! Do we want such thinking to exist in Texas? I, for one, do not." *Id.*

62. *See, e.g.,* People v. Beardsley, 113 N.W. 1128, 1131 (Mich. 1907); *see also supra* Part I(A)(1).

63. *See infra* Part I(A)(2).

64. *See* Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests,* 4 DUQ. L. REV. 345, 386 (1965). ("*[A]ctus reus* is to be interpreted as the comprehensive notion of act, harm, and its connecting link, causation, with *actus* expressing the voluntary physical movement in the sense of conduct and *reus* expressing the fact that this conduct results in a certain proscribed harm. . . .") (emphasis in original).

65. *See* MODEL PENAL CODE § 2.01(1) (1984)(emphasis added).

66. *See Beardsley*, 113 N.W. at 1131.

the defendant's control and not for uncontrollable behavior.[67] For example, in *Martin v. State*, the defendant had been found intoxicated on a public highway, in violation of a clearly drafted "public drunkenness" statute;[68] yet, his conviction was overturned because he had been dragged to that highway from his home by police officers.[69] Because he had been forced into the public area, the court determined that there had been no voluntary act on his part, and no *actus reus*.[70]

Criminal cases also discuss the "action" as being an "exercise of the will."[71] In *State v. Utter*, the defendant was charged with second degree murder in the stabbing death of his son.[72] At trial, Utter offered expert psychiatric testimony that his jungle training and experiences in World War II contributed to a "conditioned response" which caused him to kill his son involuntarily.[73] In upholding his conviction for the lesser included offense of manslaughter, the court noted that the defense of "conditioned response" is viable, because it can cause someone to kill without knowledge or will, and without any "voluntary act" on the defendant's behalf.[74]

Thus, the courts in *Utter* and *Martin* discuss the "action" in terms of control; Martin could not control his actions because of outside force, and Utter could not control his actions because of a mental disorder.[75] In still other criminal cases, defendants can escape liability based on the lack of an *actus reus* even though the conduct in question was a voluntary act.[76] In *Barber v. Superior Court*, a defendant doctor was charged with murder after removing feeding tubes from a brain-dead patient.[77] The court dismissed the charges, stating "[w]e view petitioner's conduct as that of an

67. 17 So.2d 427 (Ala. Ct. App. 1944).
68. *See id.*
69. *See id.*
70. *See id.*
71. *See* State v. Utter, 479 P.2d 946 (Wash. App. 1971); *see also infra* Part I(B)(2).
72. *See Utter,* 479 P.2d at 948-51.
73. *See id.* at 947.
74. *See id.* at 951. This defense has been followed in Washington since *Utter*. *See* State v. Perkins, 14 Wash. App. 27, 31, 538 P.2d 829, 833 (1975) ("This jurisdiction has recognized that a true conditioned response evoked by external stimuli may produce acts which completely exculpate the actor because he lacked any criminal intent.").
75. *See generally* Martin v. State, 17 So. 2d 427 (Ala. Ct. App. 1944); *Utter*, 479 P.2d at 948-50.
76. *See* Barber v. Superior Court, 195 Cal. Rptr. 484 (Cal. App. 1983); *see also infra* Part I(B)(2).
77. *See Barber,* 195 Cal. Rptr. at 486.

omission rather than that of an affirmative action. . . ."[78] Specifically, the court held that the withdrawal of the tubes was tantamount to withholding medication or nourishment, and not commensurate to actively killing the patient.[79]

American civil law also relies on the distinction between active and passive conduct to define "action" for the purposes of nonfeasance cases.[80] In *Logarta v. Gustafson* the parents of a suicide victim sued his companion for wrongful death.[81] The defendant claimed his actions were passive, rather than active, and therefore not actionable at common law.[82] The court noted, in dismissing the claim:

> [u]nder English common law, this distinction was referred to as the difference between "misfeasance" and "nonfeasance": There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and nonfeasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant. This distinction is founded on that attitude of extreme individualism so typical of anglo-saxon legal thought.[83]

Consequently, civil courts have been able to deny liability on the basis that the defendants' conduct was a passive, rather than active, gesticulation.[84] Although this distinction is frequently applied, it is difficult to use and can be applied inaccurately. For example, in *Moore v. Murphy*, a sheriff failed to continue holding a ladder for an inmate who was painting a wall.[85] The inmate fell from the ladder sustaining personal injury.[86] The court neither discussed nor imposed an affirmative duty upon the sheriff to act; rather, the court found that the sheriff's failure to keep holding the ladder was in fact an "action" and not an "omission," and the sheriff was liable for misfeasance, the commission of an overt act.[87]

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78. *See id* at 490.
79. *See id.*
80. *See* Logarta v. Gustafson, 998 F. Supp. 998 (E.D. Wis. 1998).
81. *See id.*
82. *See id.* The defendant had seen the decedent in a field, with a gun in hand, and knew at the time that he was despondent. *See id.* at 1000. The defendant then left, asking that the decedent "only think about what he was doing." *See id.*
83. *See id.* at 1001.
84. *See* Moore v. Murphy, 119 N.W.2d 759, 760 (Iowa 1963).
85. *See id* at 761-762.
86. *See id.*
87. *See id.*

Nevertheless, if the court had characterized the incident as not involving action on the part of the sheriff, he could not have been held liable for negligence under their rationale.

The result in *Moore* is analogous to an English case decided near the turn of the century, *Newton v. Ellis*.[88] There, the plaintiff was driving his carriage at night along a highway.[89] The defendant had excavated a hole in the highway without lighting the surrounding area.[90] The plaintiff fell into the hole, and sued the excavator for his failure to light it.[91] "The court viewed the digging of the hole and the failure to light it as one complex act rather than two separate events, one as an act, the other a failure to act."[92] Much like the sheriff holding the ladder, the *Newton* court viewed the totality of the defendant's conduct as "active," rather than "passive," at least for the purpose of imposing liability.[93]

B. Policy Reasons Behind the Lack of a Duty to Assist

There are many reasons behind the lack of a duty to assist in American law; one such reason often cited is to preserve the principle of personal autonomy.[94] A discussion of personal autonomy usually centers around the causation issue in failure to assist cases.[95] Scholars often argue, as did the Tennessee Supreme Court in *Bradshaw v. Daniels*, that there is a grave distinction between causing harm and failing to prevent harm.[96] Some scholars argue that the difference is significant enough to require liability in the first instance, if not in the second.[97] Hence, the argument runs, when one merely allows harm to happen, instead of consciously

88. 119 Eng. Rep. 424 (K.B. 1855); *see also* Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980) *reprinted in* A TORTS ANTHOLOGY 126 (Lawrence C. Levine, Julie A. Davies, & Edward J Kionka eds. 1993). Weinrib discusses this case and its impact upon the nonfeasance doctrine. *See id.; see also infra* Part I(B)(2).

89. *See Newton*, 119 Eng. Rep. at 424.

90. *See id.*

91. *See id.*

92. *See* Weinrib, *supra* note 88, at 129.

93. *See id.*

94. *See* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) *reprinted in* A TORTS ANTHOLOGY, *supra* note 88, at 123. Epstein discusses some of the reasons behind a lack of a duty to assist. *See id.*; *see also infra* Part I(C).

95. *See id.*

96. *See id.; see also* Bradshaw v. Daniel, 854 S.W.2d 865, 870 (Tenn. 1983); *supra* note 60 and accompanying text.

97. *See* Epstein, *supra* note 94, at 124-125.

causing it to happen, one's personal autonomy should not be violated by the imposition of liability.

Also, as in *Beardsley*, courts are reluctant to merge what they see as a moral judgment with legal liability.[98] Some scholars even assert that the lack of a duty to assist is aligned with common law morality.[99] This, again, is tied to a personal autonomy argument—some opponents of duty to assist statutes argue that the decision not to assist someone is personal and rooted in basic ideas of justice and fairness.[100]

Some authors also insist that nonfeasance can be viewed in terms of a cost-benefit analysis.[101] They argue that the costs of assisting someone may outweigh the benefits; any such costs may indeed be economic.[102] For example, if only one doctor knows the cure for a deadly but rare disease, presumably under a duty to assist statute he would be required to fly around the world curing it.[103] In short, "[s]trong arguments [have been] advanced to show that the common law position on the Good Samaritan problem is in the end consistent with both moral and economic principles."[104]

Part II

A. The Reasonably Prudent Person Doctrine, and the Exemption for Nonfeasance

The doctrine of nonfeasance, as a *per se* rule disallowing

98. *See Beardsley*, 113 N.W. at 1131; *see also supra* Part I(A)(1).

99. *See* Epstein, *supra* note 94, at 125; *see also infra* Part II(C).

100. *See id.* Epstein argues that the utilitarian views held by proponents of duty to assist laws "must in the end find some special place for the claims of egoism which are an inseparable byproduct of the belief that individual autonomy—individual liberty—is a good in itself not explainable in terms of its purported social worth." *Id.* at 125. *But see generally* Ames, *supra* note 23. Further, as discussed in *supra* Part I(A)(2), other commentators argue that personal autonomy should give way to the protection of persons in danger of bodily harm. *See id.*

101. *See* Epstein, *supra* note 94, at 125; *see also* United States v. Carroll Towing, 159 F.2d 169 (2nd Cir. 1947). Epstein discusses the cost-benefit formula derived from *Carroll Towing* and its application to nonfeasance. *See* Epstein, *supra* note 94, at 125. The *Carroll Towing* formula dictates that there is a duty between a plaintiff and a defendant only if three conditions are algebraically related. *See Carroll Towing*, 159 F.2d at 169. The formula states that if the burden on the defendant to take precautions to protect the plaintiff, (B), is less than the probability of harm to the plaintiff, (P), multiplied by the severity of harm, (H), the defendant has a duty to take those precautions. *See id.* Thus, if B is less than H times P, the defendant owes a duty to the plaintiff. *See id.*

102. *See* Epstein, *supra* note 94, at 125.

103. *See id.*

104. *See id.* at 126.

recovery, overlooks the most fundamental concept in negligence law—the "reasonably prudent person" doctrine that otherwise governs every action a person takes.[105]

> It is fundamental that negligence is tested by whether the reasonable person at the time and place would recognize and foresee an unreasonable risk or likelihood of harm or danger to others. The standard of care is the conduct of a reasonable person of ordinary prudence under the circumstances. The standard necessarily imports varying amounts of care in relation to the variable element of risk of harm. The greater the risk, the greater the care required.[106]

The reasonably prudent person doctrine has long been recognized as the general "standard of due care" owed to persons with whom we interact on a daily basis.[107] It has been said that this duty takes into account the circumstances surrounding the incident; it allows the jury essentially to step into the shoes of the defendant and determine how he 'should' have behaved.[108]

Nevertheless, American law has traditionally qualified the meaning of how a reasonable person should act by forcing upon tort law the artificial concept of nonfeasance.[109] Effectively, the doctrine of nonfeasance abridges the liability of persons who refuse to assist others in times of distress or peril.[110] Because no legal duty to act exists, American courts consistently hold that persons who fail to assist crime or accident victims have not caused actionable harm. Accordingly, the possibility that the conduct would be seen as unreasonable by a judge or jury is completely disregarded by the justice system.[111]

Case law has specifically noted that the imposition of liability for negligence and misfeasance requires a reasonableness inquiry,

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105. *See* Butler v. Acme Markets, Inc., 426 A.2d 521, 524 (N.J. 1981) (using the language "reasonable person of ordinary prudence.")

106. *Id.*

107. *See* Weinberg v. Dinger, 524 A.2d 366, 374 (N.J. 1987). ("The standard of care ordinarily imposed by negligence law is well established.")

108. *See* Coburn v. City of Tucson, 691 P.2d 1078, 1080 (Ariz. 1984). ("[T]he duty remains constant, while the conduct necessary to fulfill it varies with the circumstances. . . .").

109. *See Jackson*, 675 N.E.2d at 1358.("Ordinarily, an individual possesses no duty to act affirmatively for the protection of others and the fact that harm to another is foreseeable as a result of a failure to act does not create a duty to prevent harm . . . ."); *see also supra* note 15 and accompanying text.

110. *See Jackson,* 675 N.E.2d at 1358.

111. *See id.; see also supra* Part I(A)(1) for a discussion of duty in nonfeasance cases.

whereas disallowing recovery for nonfeasance does not. For example, in *Mattice v. Goodman,*[112] the court defined misfeasance as "not exercising reasonable care when acting," and nonfeasance as "not performing voluntary tasks in all instances, where there is no duty to act."[113] Without a requirement for reasonableness, then, the doctrine of nonfeasance operates as an exception to the otherwise widespread reasonably prudent person standard.

B. Other Exemptions to the Reasonableness Doctrine

Beyond the generally imposed duty to act reasonably, and other than situations of nonfeasance, there are certain circumstances wherein American law imposes heightened duties above the reasonably prudent person standard.[114] Breaches of these heightened duties can result in either criminal or civil liability for those who breach that duty.[115] Unlike the general duty to act reasonably, these heightened duties often impose an affirmative duty to act, in direct contrast to the doctrine of nonfeasance.[116]

There are well-developed circumstances where persons involved in certain special relationships are required to act. For example, parents owe duties to care for their children,[117] and spouses owe the same to each other.[118] Moreover, when a defendant causes harm to a plaintiff through an act of negligence or malice, and subsequently refuses assistance, the defendant can be held liable for failing to act.[119] But these duties are imposed upon willing or at least involved actors-parents and spouses, for example, know that when they enter into such relationships they have duties to care and provide for each other.

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112. 527 N.E.2d 469 (Ill. App. 1 Dist. 1988).

113. *See id.* at 472.

114. *See* Helm v. Inter-Ins. Exchange for Auto. Club, 192 S.W. 2d 417, 420 (Mo. 1946) (discussing the heightened duty arising from contractual obligations).

115. *See id.; see also* 18 U.S.C. § 2258 (1994), making breach of the duty to report child abuse punishable as a class B misdmeanor.

116. *See* Harzfeld's, Inc. v. Otis Elevator Co., 114 F. Supp. 480, 483 (D.Mo. 1953) (discussing the existence of a duty to act affirmatively and subsequent liability upon breach of that duty).

117. *See Florio*, 784 S.W.2d at 417; *see also supra* note 31.

118. *See* Borelli v. Brusseau, 16 Cal. Rptr.2d 16, 17-18 (Cal. App. 1 Dist. 1993) (discussing that the marital duty of support encompasses not only physical care, but also emotional care and love).

119. *See* Weinrib, *supra* note 88, at 128-130.

Other duties are contractual; landlord-tenant duties,[120] doctor-patient duties,[121] and fiduciary duties to professional clients[122] are all duties that parties know exist and are entered into willingly.[123] The rationale for this seems to be based upon the choice of the actors—when persons decide to take on responsibilities above and beyond that of a stranger to another stranger, they should be responsible for a greater duty of care. This duty is also applicable to actors who knowingly create dangerous situations; once they have chosen to act, courts hold that they are or should be aware of the consequences of their actions.[124]

Other heightened duties, however, are imposed upon persons who may have no relation to as other involved person at all, and who have not consciously or willingly undertaken a heightened duty or precipitated a dangerous condition. For example, landowners have certain duties to trespassers that wander onto land unseen and uninvited, even in the absence of any contractual duty.[125]

Statutes also impose duties people would not ordinarily know existed. Although perhaps merely a legislative attempt to codify the definition of reasonableness, some statutes impose affirmative duties upon tavern owners to withhold liquor from clearly intoxicated persons. Owners who breach this duty can face liability for resulting injuries to third persons harmed in drunk driving

120. *See* Crowell v. McCaffrey, 386 N.E.2d 1256 (Mass. 1979) (imposing upon landlords the duty to keep their leased premises habitable).

121. *See* Sugarman v. Board of Registration in Medicine, 662 N.E.2d 1020 (Mass. 1996).

122. *See id.*

123. *See* Vanegrift v. Am. Brands Corp., 572 F. Supp. 496 (D.N.H. 1983) (discussing the duties imposed for those who undertake contractual obligations). In cases such as these, since one undertakes a duty to contract, tort law might enforce that duty above and beyond the plaintiff's contractual remedies. *See id.; see also* 86 C.J.S. *Torts* § 4(a) (1997), "Mere nonfeasance, even if it amounts to a willful neglect to perform a contract, is not sufficient, although where performance of contractual obligations has induced detrimental reliance on continued performance, mere inaction may give rise to tort liability. . . ." *See id.* "Tort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation." *See id.* Note that the "relationship of the parties" is the impetus behind most heightened duties; parties to a contract are no different. *See id.*

124. *See, e.g.*, Newton v. Ellis, 119 Eng. Rep. 424 (K.B. 1855).

125. *See* Ryals v. United States Steel Corp., 562 So.2d 192 (Ala. 1990) (holding that even as to trespassers, landowners generally owe a duty to avoid wanton injury). *But see* Scurti v. City of New York, 354 N.E.2d 794 (N.Y. 1976). This Comment advocates the approach followed in *Scurti*, which holds that the duty should be one of reasonable care as determined by a jury. *See id.*

accidents.[126] Similarly, some statutes impose upon film developers the duty to report child abuse even when there is no relationship of the developer to the child victim.[127]

Part III

A. Modern Trends in the Law

1. Case Law—In recent years, some jurisdictions have gone outside the realm of "action" or "duty," and looked only at "reasonableness," in direct contrast to the traditional view of nonfeasance. Specifically, these courts have disbanded the notion that bystanders never have a duty to assist accident victims.[128] In *Soldano v. O'Daniels*,[129] the court held that a restaurant owner owed a murder victim a duty to call police when a death threat was made or to permit a third person to use a telephone.[130] In *Soldano*, a patron had seen the victim being threatened with a gun, and rushed into the defendant's restaurant in order to assist the victim.[131] The restauranteur's employee, however, refused to call the police himself or to allow the patron to use the restaurant's telephone.[132]

In reversing summary judgment, the court rejected the restauranteur's argument that the common law never imposed a duty to rescue one in peril, citing the "special relationship" exception to the rule.[133] Although the court did not find a "special relationship" between the defendant and the victim, it went on to fashion an additional exception to nonfeasance for this conduct.[134] The court based its new exception on public policy, namely, the

126. *See* Brigance v. Velvet Dove Restaurant, 725 P.2d 300 (Okla. 1986). *Brigance* discusses the common law rule of liability for tavern owners and the passage of dram shop statutes imposing such a duty. *See id.* The *Brigance* court also imposed such a duty in the absence of such a statute under a "reasonable care" analysis, much like that urged in this Comment. *See id.*

127. *See* 42 U.S.C. § 13031 (1994) (federal statute requiring a host of defined professionals to report child abuse upon their learning of facts "that give reason to suspect" a child has been abused); 18 U.S.C. § 1169 (1994) (federal statute requiring officers in Indian reserves to report child abuse); 18 U.S.C. § 2258 (1994) (federal statute making the failure to report child abuse a class B misdemeanor).

128. *See* Soldano v. O'Daniels, 141 Cal. App.3d 443 (Cal. App. 5 Dist. 1983).

129. *Id.*

130. *See id.* at 453.

131. *See id.* at 446.

132. *See id.*

133. *See Soldano*, 141 Cal. App. 3d at 448-450.

134. *See id.*

encouragement of citizen involvement in crime prevention.[135] Considering the importance of the telephone to such a policy, the court reasoned that telephones in businesses open to the public need to be available during business hours to persons seeking assistance in situations involving imminent danger of physical harm.[136]

However, the court underlined the narrow scope of its new rule by expressly exempting private residences from its operation.[137] The court reasoned that imposing a duty to aid the rescue attempt in the present case by permitting use of a telephone was but a small departure from the "morally questionable" rule of nonliability for inaction absent a specified duty.[138]

In defining liability for duty to assist cases, the *Soldano* case thus creates a problem: failing to act reasonably can be both non-actionable and actionable depending upon how the court defines "action," "duty," and "reasonableness." The prima facie tort case based upon the "reasonably prudent person" duty is the standard all over the country.[139] And as a result of the requirement of "reasonableness," courts and legislatures have deemed it prudent to force people in certain relationships to act affirmatively.[140] Practically speaking, though, these rules encompass different standards in different jurisdictions. Occasionally, even seeming inaction by persons between whom no duty exists has been actionable when the court characterizes the inaction as action.[141]

The *Soldano* case and the Cash scenario illustrate this point. In both cases, the actors were bystanders, uninvolved in the accident they had just witnessed.[142] The bystander of Sherrice Iverson's murder will never be charged with a crime either because his conduct can be viewed as "passive," or because he had no duty to assist her.[143] The other is found to be liable for his conduct because the court, after examining public policy, found he had committed an "action" in derogation of his duty for the purposes of tort liability.[144]

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135. *See id.* at 449.
136. *See id.* at 452.
137. *See id.*
138. *See Soldano*, 141 Cal. App. 3d at 455.
139. *See, e.g.*, Jackson v. Forest City Enterprises, 675 N.E.2d 1356, 1358 (Ohio App. 1996); *see also supra* text accompanying note 23.
140. *See supra* Part II(B).
141. *See Barber*, 147 Cal. App. 3d 1006; *see also supra* Part I(A)(2).
142. *See Soldano*, 141 Cal. App. 3d 443; *see also* Dyckman, *supra* note 4.
143. *See* Dyckman, *supra* note 4 and accompanying text.
144. *See Soldano*, 141 Cal. App. 3d 443.

At least two courts, though, have undertaken to adopt a system of liability based solely upon reasonableness, disregarding the traditional emphasis on duty or action through some recent cases.[145] In New Jersey, the tension between action and inaction has been the subject of such a transformation in the specific area of spousal liability.[146] Until recently, New Jersey courts abided by the traditional concept of nonfeasance in suits against spouses of sexual offenders.[147] In *Rozycki v. Peley*, parents of a group of young boys who were sexually molested by a neighbor sued the neighbor's wife, alleging that she knew of her husband's pedophilia, and that she had a duty to warn the boys of his dangerous tendencies.[148] In examining the parents' claims, the Superior court noted that the "[p]laintiffs' contention [was] essentially based on public policy considerations. They argue[d] that there is a broad public interest in preventing sexual assault on small children which requires the imposition of a duty."[149] The court also noted the plaintiffs' "special relationship" contention, stating that the plaintiffs "analogize[d] the instant case to situations in which parents have been held responsible for the torts of their children, or landowners held liable for the dangerous condition of their property."[150]

While sustaining the wife's motion for summary judgment, the court, in keeping with the traditional rule of nonfeasance, held that the wife did not have a duty to warn the victims of her husband's tendencies.[151] In doing so, the court examined several cases in which it believed such a duty was recognized, such as in the context of a relationship with a therapist or a doctor, and refused to extend that reasoning to spousal immunity.[152] Specifically, the court noted the lack of precedential rulings imposing a duty upon spouses of pedophiles to warn potential victims.[153] The court also distinguished cases that have imposed such a duty to warn on the ground that those cases were limited to instances involving mental health professionals.[154]

But just as the public policy argument was firmly rejected in *Rozycki*, it was embraced in a subsequent decision by the New

145. *See* Rozycki v. Peley, 489 A.2d 1272 (N.J. 1984).
146. *See id.*
147. *See id.*
148. *See id.* at 1272.
149. *See id.* at 1273.
150. *See Rozycki*, 489 A.2d at 1273.
151. *See id.* at 1277.
152. *See id.* at 1274-76.
153. *See id.* at 1275.
154. *See id.*

Jersey Supreme Court, directly overruling the earlier superior court decision.[155] In *J.S. v. R.T.H.*, parents brought suit against the wife of a man who sexually abused their two daughters.[156] In *J.S.*, the court decided the issue of spousal liability based not upon a heightened duty ascribed to the wife, but upon the traditional duty to be a reasonably prudent person.[157] The court detailed

> [a]fter "weighing . . . the relationship of the parties, the nature of the risk, and the public interest," *Goldberg*, supra, 38 N.J. at 583, 186 A.2d 291, we conclude that if plaintiffs prove Mary was aware of her husband's conduct or history, it was foreseeable that he posed a danger to these young girls, and it is fair to hold that Mary had a duty to take reasonable steps to protect them from such danger. Our conclusion derives from the continuity and nature of the social relationship between these next-door neighbors and the girls' habitual and repeated visits of which Mary was clearly aware. Under such circumstances, the girls and their parents had a reasonable expectation that Mary would not knowingly expose them to the risk of sexual assault by her own husband. It will be a jury's role to determine the specific contours of her duty, and whether she deviated therefrom, based upon its findings as to the extent of her knowledge and the foreseeability of harm.[158]

More recently, South Carolina has followed the same principles discussed throughout *J.S.* in another failure to warn case involving child sexual abuse. In *Doe v. Batson*,[159] a man had abused several boys in the home he shared with his mother. After the man had been convicted of seventeen counts of child abuse, the parents of his victims brought a negligence suit against his mother for failure to warn them of the man's sexual propensities.[160] In the suit, the parents alleged that the defendant mother knew her son was taking his young victims into his bedroom, and therefore, should have warned the parents.[161]

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155. *See* J.S. v. R.T.H., 693 A.2d 1191 (N.J. 1997).
156. *See id.*
157. *See id.* at 1193-94.
158. *Id.* at 1194. Ironically, this "reasonableness" requirement was effectively legitimized years ago even though it was not embraced throughout the doctrine of nonfeasance. If it were not reasonable to make someone liable for inaction, as in *J.S.*, the definition of nonfeasance would not ever have been defined as "the failure to do that which ought to be done." *See id.; see also supra* Part I.
159. No. 3092, 1999 WL 1220010 (S.C. App. Dec. 20, 1999).
160. *See id.*
161. *See id.*

At the trial court level, summary judgment was granted against the victims' parents' for failure to state a claim; the court found no duty to warn under the circumstances alleged as a matter of law.[162] The court of appeals reversed, noting that the question of liability under the circumstances alleged was a novel question in South Carolina law.[163] After discussing the general proposition of non-liability for nonfeasance, the court noted the state's doctrine of imposing liability upon persons who fail to control the behavior of people in custody such as prisoners.[164] The reasoning was based upon the "special relationship" theory, in that the person supervising one in custody is in the best position to warn outsiders of harm.[165]

The court discussed that other states, including New Jersey, are increasingly reviewing the question of liability under circumstances involving child sexual abuse.[166] In reversing the summary judgment ruling, the court also noted that the parents' may have had a viable claim under a premises liability theory, as well as under a special relationship theory.[167]

2. *State Bills and Statutes*—Other solutions to this melting pot of tort law are increasingly being codified by state legislatures through criminal statutes. Similar to New Jersey's and South Carolina's approach to spousal liability, the laws being introduced represent a movement to broaden the definition of what is required of a "reasonably prudent person" to include affirmative action. This approach not only allows for a unilateral application of the law, but guards against imposing liability when a reasonable person would not have acted. An expansion of the "reasonableness" test also guards against forcing people to interject in dangerous situations - it is difficult to call jeopardizing one's own safety "reasonable," just as it may be difficult to define failing to call 911 as "reasonable."

Although the new statutes codify this expanded definition of reasonableness, many of them are typically child-abuse specific.[168] The Texas legislature recently passed a law making it illegal for a witness to child abuse to fail to either assist the child or report the

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162. *See id.* at *1.
163. *See id.* at *4.
164. *See Batson,* No. 3092, 1999 WL 1220010, at *4.
165. *See id.*
166. *See id.*
167. *See id.*
168. *See Girl's murder prompts California to consider 'Good Samaritan' laws, supra* note 18, at A22.

abuse, even if the witness has no prior relationship to the child.[169] The law requires the witness to judge whether a "reasonable person would believe" that an offense was being committed, specifically expanding the reasonableness rationale to include the affirmative acts required by the statute.[170] The Act also allows a witness to avoid conviction when he or she would be put in "danger of suffering serious bodily injury or death."[171]

In New Jersey, an analogous bill was recently passed making it a crime for an adult to fail to report an incident of sexual abuse against a child.[172] Similarly, in California, three such bills have been introduced that would protect children.[173] One bill makes it a misdemeanor to fail to report a violent crime against anyone, a sexual crime against anyone under 14, or an assault on a child that is likely to cause substantial bodily harm to the child.[174] A second requires anyone who witnesses a murder, rape or other serious assault to report the incident to police as soon as possible.[175] Failure to report such crimes can be either a felony or a misdemeanor, depending on the discretion of the local district attorney.[176] The third makes it a felony to fail to report sexual assaults or violent crimes against anyone under 16.[177] The bill also contains an exception to prosecution if the witness fears retaliation.[178]

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169. TEX. PENAL CODE ANN. § 38.17 (West 1994). The Act provides that:

a) A person, other than a person who has a relationship with a child described by Section 22.04(b), commits an offense if: (1) the actor observes the commission or attempted commission of an offense prohibited by Section 22.021(a)(2)(B) under circumstances in which a reasonable person would believe that an offense of a sexual or assaultive nature was being committed or was about to be committed against the child; (2) the actor fails to assist the child or immediately report the commission of the offense to a peace officer or law enforcement agency; and (3) the actor could assist the child or immediately report the commission of the offense without placing the actor in danger of suffering serious bodily injury or death.

b) An offense under this section is a Class A misdemeanor.

Id.

170. *See id.*

171. *See id.*

172. *See* Finz, *supra* note 18, at A21.

173. *See Girl's Murder Prompts California to Consider 'Good Samaritan' Laws*, *supra* note 18, at A22.

174. *See id.*

175. *See id.*

176. *See id.*

177. *See id.*

178. *See Girl's murder prompts California to consider 'Good Samaritan' laws*, *supra* note 18, at A22.

Likewise, in Nevada, a newly introduced statute also carries a serious penalty—persons who fail to report sexual abuse against a child can face a felony conviction.[179] A similar bill is being backed in Michigan by two state senators and the state attorney general.[180] This bill would "punish witnesses with up to four years in prison for failing to report the abuse, kidnapping or serious injury of a child."[181]

These statutes may well represent a change in the law that will effectuate protection of children. But such statutes can only be effective if there is momentum to enforce them in the individual states. Surprisingly, at least six states have had duty to assist statutes protecting both children and adults in effect for several years, but the failure to enforce the statutes renders them useless.[182]

Vermont has had such a law since 1967, however, officials say that it may never have been used.[183] John T. Quinn chairs the executive board for Vermont's county prosecutors.[184] He says, "I have been in this state 20 years, and I can't recall a case where we used this statute. . . ."[185] Referred to as the Duty to Aid the Endangered Act, Vermont's law requires anyone who observes a person subject to "grave physical harm" to render "reasonable assistance," unless aid would result in danger to the bystander.[186] Violating the law carries a $100 fine.[187]

Wisconsin has a similar statute that largely remains dormant.[188] This statute also requires bystanders to assist crime victims, but has liberal exception provisions if the bystander would be in danger or if someone else has rendered assistance.[189] Yet, in the eight years directly following its inception, the law was not enforced once.[190] In 1992, the law was applied for the first time to prosecute two people

179. *See* Maura Dolan, *'Good Samaritan' Laws Are Hard to Enact, Experts Say Aid: Outrage over inaction of Strohmeyer friend sparks calls for bills. But existing legislation has limited success,* L.A. TIMES, September 9, 1998, at A1.

180. *See* TRIBUNE NEWS SERVICES, *supra* note 13, at 3.

181. *See id.*

182. *See* Pardun, *supra* note 14, at 596-97.

183. See VT. STAT. ANN. tit. 12, § 519 (1967); *see also* Dolan, *supra* note 179, at A1.

184. *See* Dolan, *supra* note 179, at A1.

185. *See id.*

186. *See id.*

187. *See id.*

188. See WIS. STAT. § 940.34. (West Supp. 1999); *see also* Dave Daley, *Few prosecuted under state 'Samaritan' law; Like France, Wisconsin requires residents to help crime, accident victims,* MILWAUKEE J. SENT., September 5, 1997, at 9.

189. *See* Daley, *supra* note 188, at 9.

190. *See id.*

for failing to assist a 16-year old-girl who was being "savagely beaten at a party."[191]

"The two. . .were sentenced to probation, fined $300 each and ordered to perform community service after a jury found they should have helped the girl, beaten after she rebuffed the sexual advances of another partygoer."[192]

In 1994, a Wisconsin appellate court upheld the statute in the face of a defendant's constitutional challenge.[193] Nevertheless, the statute is still rarely applied.[194] James Haney is the Wisconsin Attorney General's director of research and information.[195] In a recent interview, Haney indicated that prosecutors have rarely called his office with questions about enforcing the failure to assist statute.[196] Haney also said, in explaning the dearth of calls, "It's not the kind of issue that we heard a lot about, . . . [w]hile it might be a little rosy-eyed to say this, I think the good people of Wisconsin generally aid victims when they see them in trouble."[197]

Several other states have similar statutes lying dormant on their books. Both Ohio and Washington have enacted statutes requiring bystanders to aid police officers.[198] Washington's statute provides for misdemeanor penalties when one, "upon request by a person he knows to be a peace officer, . . . unreasonably refuses or fails to summon aid for such peace officer."[199] The Ohio statute, on the other hand, specifically provides an exception for liability when a bystander would be put in apparent risk.[200] The Ohio statute reads in pertinent part:

> No person shall negligently fail or refuse to aid a law enforcement officer, when called upon for assistance in preventing or halting the commission of an offense, or in apprehending or detaining an offender, when such aid can be given without a substantial risk of physical harm to the person giving it.[201]

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191. *See id.*
192. *See id.*
193. *See id.*
194. *See* Daley, *supra* note 188, at 9.
195. *See id.*
196. *See id.*
197. *See id.*
198. *See* OHIO REV. CODE ANN. § 2921.23 (Banks-Baldwin 1997); WASH. REV. CODE ANN. § 9A.76.030 (West 1988).
199. *See* WASH. REV. CODE ANN.§ 9A.76.030.
200. *See* OHIO REV. CODE ANN. § 2921.23.
201. *See id.*

Two other statutes directly codify the "reasonableness" approach in cases involving civilian victims.[202] Massachusetts's duty to assist statute provides in pertinent part:

> Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars.[203]

Although this statute provides for a determination based upon reasonableness, it actually does nothing more than ensure that the police eventually will be involved. Rhode Island's duty to assist statute, in contrast, provides for assistance, and not mere reporting:

> Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section shall be guilty of a petty misdemeanor and shall be subject to imprisonment for a term not exceeding six (6) months or by a fine of not more than five hundred dollars ($500), or both.[204]

The use of the word "emergency" in the Rhode Island statute presumably allows for prosecution when people refuse to give assistance at the scenes of both crimes and accidents. In any event, many of these statutes allow a jury to decide the question of reasonableness in the context of duty to assist cases.[205] The statutes also require this inquiry to be objective. For example, since the Rhode Island statute requires "reasonable assistance" and the Massachusetts statute requires assistance "within a reasonable time," there is no room for defendants to evade responsibility by pointing to their subjective beliefs when an otherwise reasonable person would have rendered assistance.

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202. *See* MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1983); R.I. GEN. LAWS § 11-56-1 (1984).
203. *See* MASS. GEN. LAWS ANN. ch. 268, § 40.
204. *See* R.I. GEN. LAWS § 11-56-1.
205. *See id.*

B. How the Changing Law is More Effective

1. Current Confusion in Defining "Duty" and "Action/Inaction"—The current system of imposing liability based upon "duty" or "action/inaction" is inconsistent at best, and a clear rejection of typical American negligence principles at worst. An examination of *Barber* within the concept of "action/inaction" analysis illustrates these inconsistencies in the basic definitions of American law.[206] In *Barber*, the court could have determined that the doctor's removal of feeding tubes was within the duty of reasonable care he owed to the victim, without attempting to determine whether his acts were in fact omissions. This analysis seems especially appropriate considering the "victim's" articulated wishes not to be kept alive by machines.[207] But by defining the defendant's conduct as omission, *Barber* stands for the proposition that defendants who engage in voluntary acts, as overt as physically removing feeding tubes, may not be acting at all.[208] *Moore*, on the other hand, stands for exactly the opposite proposition: that one who stops in the middle of an action, such as holding a ladder, without more has committed an actionable affirmative overt act.[209]

Both *Barber* and *Moore* involve defendants who ceased to provide services that they had previously provided for the plaintiff or victim. The only difference between the actions of the two defendants is that one removed his hands and walked away from a ladder, and the other physically removed a feeding tube. Presumably, the acts of removing one's hands from a ladder and pulling tubes out of a patient's body are somewhat similar in effect. If anything, the removal of tubing seems to be more "overt" in the length of time and the amount of contact required of the defendant.

Usually, in civil cases where liability hinges on the definition of "action," courts distinguish action from inaction without much analysis or explanation; yet, the definition often changes from case to case. In some civil cases, "action" is defined with regard to "purpose," or "awareness," as in the criminal context.[210] As a

206. *See* Barber v. Superior Court of Los Angeles, 195 Cal. Rptr. 484 (Cal. Ct. App. 1983); *see also supra* Part I(A)(2) (discussing the *Barber* "action/inaction" analysis).

207. *See Barber,* 195 Cal. Rptr. at 493.

208. *See id.*

209. *See* Moore v. Murphy, 119 N.W. 2d. 759 (Iowa 1963). *Moore* discusses the conduct in question as "misfeasance," the designation typically reserved for affirmative conduct leading to liability. *See id.* at 761.

210. *See supra* Part I(A)(2); *see also* A.P. Simester, *New Voices in Criminal Theory, On the So-called Requirement for Voluntary Action,* 1 BUFF. CRIM. L.

consequence, there is virtually no way to predict, especially in close cases and in the light of cases like *Barber*, how a court will rule if a defendant asserts the defense of not committing an overt act.

At the very least, courts' characterization of the distinction between nonfeasance and misfeasance is often unclear. From case to case, the definition of nonfeasance is virtually identical to traditional definitions of misfeasance.[211] In *Casale v. Housing Authority of City of Newark*, the court discussed a claim against a city for failing to shovel snow on a public sidewalk.[212] The court discussed the thesis that "the omission to take precautions in something that *ought* to be done has the same legal consequence as the commission of something that ought not to be done."[213] Ironically enough, the court's rationale in discussing wrongdoing, that the defendants "ought" to have acted, is exactly the definition of nonfeasance that typically results in non-liability for defendants, as discussed in the *Beardsley case*.[214]

It makes little difference to the outcome of any given case, though, whether a court chooses to negate liability on the basis of no "action" or a lack of a duty. If a duty exists, either that duty imposes an affirmative act, or it does not; any superficial discussion of whether the defendant's conduct is active or passive is unnecessary. In discussing the lack of an "action," courts in most cases could simply define the duty involved as not encompassing affirmative action.

This distinction of "active" and "passive" conduct constituting a basis for imposing liability has not gone without criticism.[215] In examining *Newton*, Ernest Weinrib writes, "[f]or principled use by

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REV. 403 (1998). Simester attempts to create a concrete definition of "overt act" for the purposes of tort law. *See id.* Simester discusses the difficulty of determining the "action" in tort cases, and details the importance, above all, of moral culpability in establishing criminal guilt. *See id.* Simester's analysis can be applied to the Cash scenario; Simester specifically argues that omissions, being different from overt actions, are difficult to define and therefore punish. *See id.* at 417-418. Yet, as this Comment argues, if Cash were punished based upon moral culpability, as is the practical basis of all criminal statutes, the definition of his "action" or "inaction" would be unnecessary. *See id.*

211. *See* Casale v. City of Newark, 125 A.2d 895 (N.J. 1956).

212. *See id.*

213. *See id.* at 897.

214. *See id.* In *Casale*, the court determined that the city would not be liable for the Plaintiff's harm, not because of a lack of wrongdoing, but because the failure to act was attributable to the city's agents and not to the city itself. *See id.* The court noted that the doctrine of *respondeat superior* did not apply to a nonfeasance scenario, even if "there was some proof of active wrongdoing in this case." *See id.* at 897; *see also* People v. Beardsley, 113 N.W. 1128, 1131 (Mich. 1907).

215. *See* Weinrib, *supra* note 88, at 129.

courts, the unelaborated distinction between active and passive conduct is inadequate."[216] Weinrib goes on to detail the difficulties with an analysis based on action.[217] He argues that defendants pleading nonfeasance based on the lack of an "overt act" really are "acting" by virtue of their omissions.[218] "Indeed, [the defendant's] act may have been quite callously deliberate, as when an employer vindictively refuses to make an elevator available to employees who wish to emerge from a mine."[219] Weinrib also suggests that "[a] defendant in a nonfeasance case, then, can concede that in one sense he has acted yet argue that in a second sense he has not acted."[220]

At least one court has abandoned a similar "antiquated" distinction in American law in favor of a "reasonableness" standard; in *Scurti v. City of New York*, the plaintiff had sued a municipality for the death of his son.[221] His son, in trespassing upon a city-owned railroad yard, had been electrocuted by high-voltage wires.[222] The trial court had granted summary judgment for the defendant, based upon the traditional distinctions of the duties owed to trespassers, licensees, and invitees.[223] The court noted that the plaintiff's claim had been dismissed by the lower court because he had been a trespasser at the time of his death, thus, under the traditional distinctions the defendant owed him only the duty to refrain from "willful or wanton injury."[224]

Nevertheless, the court "held that the liability of a landowner to one injured upon his property should be governed, not by the ancient and antiquated distinctions between trespassers, licensees, and invitees decisive under common law, but rather by the standard applicable to negligence cases generally, i.e., the 'standard of

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216. *See id.* The Restatement (Second) of Torts has noted that one possible reason for the distinction between "action" and "inaction" may be outdated.

> In the early law, one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence, liability for nonfeasance was slow to receive any recognition in the law.

RESTATEMENT (SECOND) OF TORTS § 314 cmt. c, at 116-17 (1965).

217. *See* Weinrib, *supra* note 88, at 129.
218. *See id.*
219. *See id.*
220. *See id.*
221. 387 N.Y.S.2d 55 (1976).
222. *See id.*
223. *See id.*
224. *See id.* at 57.

reasonable care under the circumstances where by foreseeability shall be a measure of liability.' "[225]

2. *Personal Autonomy and Causation*—As indicated above, critics who decry the imposition of a duty to assist often rely on arguments associated with personal autonomy or causation. Both doctrines, however, have their limits. Personal autonomy is no doubt an important concept in American jurisprudence. But this right is greatly restricted through statutes or common law creating heightened duties in certain relationships or contracts. Additionally, one does not have the personal autonomy to act generally as an unreasonable person would. Actually, the reasonableness doctrine, even if applied to nonfeasance, grants most Americans the greatest personal autonomy available—the right to act as we normally would want to.

In the reasonableness context, people are typically seen as "unreasonable" for doing things that infringe upon another person's personal autonomy. Courts find persons liable when they assault someone against that person's will, or when they negligently cause harm to someone's reputation with libelous action.

A reasonableness test also addresses the cost-benefit analysis discussed by opponents of the duty to assist. By definition, if a decision not to assist would fail a cost-benefit analysis, such a decision most likely would not be found reasonable by a jury.

Likewise, it does not necessarily follow that one who has failed to assist another person in a time of distress has not caused or furthered the victim's pain. Although it can be argued that there is a difference between directly causing harm and merely allowing harm to happen, the analysis in failure to assist cases fulfills the traditional "but for" causation test.[226] This test dictates that if "but for" the defendant's conduct the plaintiff would not have been harmed.[227] Obviously, "but for" David Cash's failure to assist Sherrice Iverson, there is a reasonable probability that she would be alive today.

The causation analysis also fails the proximate cause test, as least as it is defined with reasonableness in mind.[228] If a jury were allowed to make a determination of liability, it might easily

225. *See id.* at 55.

226. *See* Salinetro v. Nystrom, 341 So. 2d 1059 (Fla. 1977).

227. *Salinetro* details the counterfactual test of causation; it asks what would have happened if the defendant had not acted. *See id.* The test essentially requires a finder of fact to imagine an alternative set of events bearing no relation to what really happened in order to determine liability. *See id.*

228. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

determine that the traditional proximate cause test of *Palsgraf* can be satisfied in duty to assist cases.[229] *Palsgraf* requires that the defendant must, under the circumstances, reasonably appreciate that some danger may result because of his behavior.[230] Of special importance is that *Palsgraf* does not require a defendant to appreciate the specific harm involved, just the possibility of an accident.[231]

This proximate cause test can be logically applied to failure to assist cases, in a manner that is consistent with the spirit of *Palsgraf*. If a jury would find that a bystander would reasonably know that his omission would result in harm to an accident or crime victim, liability would attach. In the case of David Cash, for example, a jury could have easily found that Cash reasonably knew his failure to assist Sherrice Iverson resulted in more abuse and torture from Jeremy Strohmeyer.

3. Morality—Perhaps the best reason behind enforcing duty to assist laws is the reason no legal scholar wants to discuss—the issue of morality. As was discussed in *Beardsley* and *Knowles*, courts are reluctant to impose a seemingly moralistic obligation on uninvolved actors.[232] But the evolution of any law is ultimately tied to society's sense of right and wrong; it is spurred by a feeling of what one "should do."[233] As one author suggests, the morality concern surrounding nonfeasance is what makes it such a contentious issue:

> Both courts and commentators generally consider it morally outrageous that the defense of nonfeasance can deny endangered persons a legal right to an easy rescue. Yet the defense is taken to be so basic to the law and so compelling that it overrides the moral perceptions of the judges and the shared attitudes of the community. This in itself is a tribute to nonfeasance.[234]

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229. *See id.*
230. *See id.*
231. *See id.*
232. *See* People v. Beardsley, 113 N.W. 1128 (Mich. 1907); U.S. v. Knowles, 26 Fed. Cas. 800 (N.D. Cal. 1864).
233. *See* JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80-82 (1883), for a discussion of how morality is the impetus for all criminal law and the determination of punishment. "The sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment." *Id.*
234. *See* Weinrib, *supra* note 88, at 131.

In short, there is no reason why American law should not be influenced by some sense of moral right and wrong; it is not a faith or a religion through which the public was outraged at Cash's conduct, but through a gut feeling that his failure to assist a seven-year-old was repugnant. People were not publicly repulsed by Cash's behavior as a heavy handed attempt to influence politics or the social arena, but because it viciously affronts something that Americans hold dear—the right of persons to rely on each other in true emergency situations.

4. The Nonsense of Abridging Liability for Nonfeasance—As has been seen, various heightened duties are often imposed as exceptions to the generally prescribed reasonableness doctrine. Statutes that impose these duties do so for purposes of preventing drunk driving deaths, preventing child abuse, and enforcing contractual agreements. Nonfeasance, then, by lying outside the doctrine of reasonableness, also operates as an exception to the general rule of reasonableness. Nonfeasance, however, is an abridgment of duty, and not an expansion of it. Effectively, nonfeasance restricts what otherwise would have been a duty if the question of reasonableness would have been submitted to a jury.

By imposing heightened duties in certain well-delineated and specific categories, the legislature has merely codified what society's sense of morality and reasonableness unquestionably says should be done. For example, it is thought of as reasonable for a doctor to report child abuse. Similarly, society views it as reasonable for tavern owners to refrain from serving alcohol to visibly drunk persons. What the statutes effectively do is ensure that this reasonableness is uniformly applied across the country.

But the statutes have another altogether prudent purpose for existing—they put unreasonable people on notice that their behavior is likely to result in liability. Not only do statutes like this uniformly apply reasonableness, then, they also act as a way to make people specifically aware of the potential for liability if they act unreasonably.

It is difficult to understand why society's sense of morality and reasonableness should be reflected in the heightened duty statutes and in common law negligence principles, but not with regard to a duty to assist. Nonfeasance is essentially a "get out of jail free" pass. It is a way to act unreasonably that operates contrary to society's collective sense of morality and even logic. Indeed, the reasons for "mandated reasonableness" are compelling: preventing child abuse and drunk driving are but two of the soundest reasons imaginable.

The reasons in support of nonfeasance, on the other hand, are not as compelling, especially when compared to the rationale behind the heightened duty statutes. Personal autonomy is abridged for the sake of abused children, but not when David Cash watches his friend abuse and murder a young girl. This outcome is not only illogical, it is also directly contrary to society's notions of what "should be" the law.

C. Toward a Reasonable Standard of Negligence Law

In order to more consistently apply the concept of reasonableness in both the criminal and civil contexts, a uniform duty to assist standard is necessary. Much like the child abuse statutes, a duty to assist statute would encompass what society already considers to be reasonable. A statute encompassing the goal of merging criminal liability with reasonableness might read as follows:

Criminal Liability for Failure to Assist

1. **General Rule**: It shall be a crime for witnesses to violent actions to deny assistance to the victims of such actions.

2. **Affirmative defenses**: It shall be an affirmative defense to prosecution under this statute if the defendant reasonably believed his or her safety would have been endangered by rendering such assistance. Should the trier of fact find that the defendant reasonably believed that he or she would be endangered, or that a defendant's acquaintance or family member would be endangered, the defendant shall not be convicted. Also, should the evidence support a finding that the defendant reasonably believed an attempt to assist would result in greater harm to the victim, the defendant shall not be convicted.

3. **Exemptions**:

Duplicity: Persons shall be exempt from prosecution under this statute if the trier of fact finds that assistance has already been rendered to the accident or crime victim, and that the defendant was aware of such assistance.

Impossibility: Persons shall be exempt from prosecution if the trier of fact finds that assisting the victim would have been impossible, by reason of the defendant's mental defect, age or infirmity, or by physical impossibility.

Definitions:

> **Assistance:** help in either reporting the incident of crime or in attempting to stop the crime. For the purpose of this statute, the requirement to assist may be satisfied by a telephone call to the proper authorities, but is not limited to such action, nor is the telephone call specifically required.
>
> **Deny:** the failure to render, or action which constitutes assistance being delayed. This term also encompasses affirmative action which is intended to interfere with the giving of assistance.
>
> **Endangered:** put in physical peril, either through direct threats from the assailant, physical contact from the assailant, or from the specific circumstances surrounding the incident.
>
> **Violent actions:** actions that could result in death or serious bodily harm, including but not limited to actions that would constitute the crimes of, physical assault, battery, sexual assault, murder, manslaughter, attempted murder, child abuse, and rape.

Such a statute would allow a jury to determine if a person like David Cash acted reasonably in denying Sherrice Iverson assistance, or whether his actions constituted conduct deserving of criminal liability. If the trier of fact would determine that a defendant who refused to offer assistance at the scene of a crime acted within the bounds of reasonableness, that defendant would not be punished. On the other hand, if the trier of fact would determine that reasonable people would have offered assistance, the defendant would receive punishment for his or her unreasonable actions.

A corresponding civil statute is also necessary to unilaterally apply the "reasonableness" approach to failure to assist cases. Such a statute might read:

Duty to Assist Victims of Emergencies

> 1. **General rule**: There shall be imposed upon witnesses of violent crimes and accidents involving serious bodily injury or risk of serious bodily injury a duty to report such accidents or crimes to the appropriate authorities. There shall also be imposed upon such witnesses a duty to render reasonable assistance to involved victims.

> 2. **Definitions:** *Reasonable:* In determining reasonableness for the purpose of this statute, the trier of fact may take into account the following factors, but is not limited to these factors:
>
> 1. The witness's objectively reasonable fear of danger to him or herself, his or her family member or accompanying bystander, or additional or aggravated danger to the victim,
>
> 2. The impossibility of assistance,
>
> 3. If assistance has already been rendered and the witness realizes that fact,
>
> 4. The age or infirmity of the witness,
>
> 5. The external surroundings of the incident. The trier of fact may not take the defendant's subjective fear into account if that fear is not objectively reasonable.

If duty to assist statutes are to be effective nationwide, the federal government must encourage their passage in all the states. In order to do this, Congress might condition federal funding on the passage of such a statute. Congress could also allow states to pass their own versions of duty to assist statutes, or require passage of a uniform civil or criminal version. States could be allowed to pass statutes of this kind without affirmative defenses—that is, a criminal statute that would require prosecutors to prove the defendant's safety was not in danger. States could pass versions of this legislation focusing on either reporting or assisting, or either on crimes or accidents. States could also be allowed to punish offenders as they saw fit. Thus, an offense under the criminal statute could be punished as a misdemeanor or a felony, and civil statutes could have limited damages provisions. Of course, these options would mean that the statutes would differ somewhat from state to state, but at least states would be encouraged to look at reasonableness when people fail to give assistance to crime and accident victims.

The tougher question is one of enforcement of the criminal statutes.[235] In order to encourage enforcement, prosecutors could use these statutes as a basis for plea bargains, as they do for other

235. *See* Dolan, *supra* note 179, at A1.

crimes without necessarily restricting corresponding penalties. Also, once the statutes are publicized, as such federal programs often are, potential defendants and victims may be on actual notice of this criminal behavior, providing local police departments with a better ability to enforce them.

Conclusion

As an interesting postlude to the Sherrice Iverson murder, although Nevada officials have been unable to charge David Cash with a crime, federal officials are now investigating him in connection with civil rights violations.[236] In December 1998, investigators began an inquiry into a racial slur Strohmeyer allegedly made about his victim; consequently, some officials believe Cash refused Sherrice Iverson assistance because of her race.[237] The exact charges being investigated are unknown.[238]

Perhaps motivated by widespread public discord, it now appears that the federal government is attempting to do what the courts and state legislatures have refused to - hold someone accountable for failing to assist another. But this attempt to rectify matters with an angry public runs directly counter to common law. After all, if there is no duty to assist, what does it matter *why* someone refuses to act within the law? Cash could have refused assistance for any or no reason, if he had no duty to assist Sherrice.

If this attempt at a "reasonable" assessment of liability in failure to assist cases is to succeed, it must have its impetus in the legislature, and not in the judiciary. After all, following the Iverson murder and Princess Diana's untimely death, public sentiment in support of such liability has been higher than ever. The public outrage surrounding Sherrice Iverson's untimely death should provide legislatures with the impetus to do what the judiciary cannot. Perhaps it has taken some vicious paparazzi and a drug addicted teenage murderer to turn public sentiment away from the "rosy-eyed" notion that "good people. . .generally aid victims when they see them in trouble."[239] Or perhaps people nationwide are simply not as upstanding as are Wisconsin residents. And maybe

236. *See* Associated Press, *2 Friends of Killer Testify In Casino Slaying,* S. D. UNION TRIB., Dec. 18, 1998, at A6.
237. *See id.*
238. *See id.*
239. *See* Daley, *supra* note 188, at 9.

criminal sanctions would not have saved Sherrice Iverson, but maybe they would have rendered David Cash responsible for looking over that stall door and watching her die.

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